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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/619,131	07/14/2003	Shane E. Weyant	DB001016-001	6900
23990	7590	11/01/2004	EXAMINER	
			MAYO, TARA L	
		ART UNIT		PAPER NUMBER
		3671		

DATE MAILED: 11/01/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/619,131	WEYANT ET AL.	
	Examiner	Art Unit	
	Tara L. Mayo	3671	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 01 July 2004.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-7 and 28-32 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-7 and 28-32 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 01 July 2004 is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____.
3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date <u>20040701</u> .	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: _____.

DETAILED ACTION

Drawings

1. The drawings were received on 01 July 2004. These drawings are accepted.

Specification

2. The prior objection to the Abstract set forth in the last Office action has been overcome by the response filed 01 July 2004.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 1 through 7 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

With regard to claim 1, the scope of the claimed invention is rendered indefinite by the positive recitation of the retaining wall and the tieback rod. Specifically, it is unclear whether the claim is intended to be drawn to the wale alone or the combination of the wale and the retaining wall and the tieback rod. Claim 6 is similarly rejected. For the purpose of prosecution on the merits, the Examiner has considered the claims to be drawn to the wale alone.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102

that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claim 28 is rejected under 35 U.S.C. 102(b) as being anticipated by Rainey

(U.S. Patent No. 6,168,351 B1).

Rainey '351, as seen in Figure 2, shows a wale (42) for use in bracing a retaining wall (10), said wale comprising:

with regard to claim 28,

a back wall (48) having a first opening therein and operable for receiving a tieback rod therethrough;

a front wall (50) having a channel formed therein and having a second opening therein and operable for receiving the tieback rod therethrough;

a plurality of connecting walls (44, 46) connecting said back and front walls to form at least one chamber between said back wall and said front wall.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented

and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

9. Claims 1, 2, 6 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weber (U.S. Patent No. 5,435,669A).

Weber '669, as seen in Figures 7A through 7E, shows a wale (87, 74) comprising:

with regard to claims 1 and 28,

a back wall (74);

a front wall (88) having a channel (89) formed therein; and

a plurality of connecting walls (76, 77) connecting said back and front walls to form at least one chamber between said back wall and said front wall;

with regard to claim 2,

wherein said wale is of a unitary construction and said plurality of connecting walls includes a top wall and a bottom wall, and wherein a single chamber is formed between said back wall and said front wall; and
with regard to claim 6,

a back wall (75);
a front wall (78) having a top portion and a bottom portion interconnected by a C-shaped channel portion;
a top wall (76) connecting said back wall to said top portion; and
a bottom wall (77) connecting said back wall to said bottom portion to form a chamber between said back wall and said front wall.

Weber '669 shows all of the features with the exception(s) of:
with regard to claim 1,
the channel having a depth sufficient such that when the wale is secured to the retaining wall, a tieback rod passing through the wale and a fastener do not protrude from the channel.

With regard to claims 1 and 6, it would have been obvious to one having ordinary skill in the art at the time the invention was made to make the channel of the device shown by Weber '669 of a depth sufficient such that when the wale is secured to the retaining wall, a tieback rod passing through the wale and a fastener do not protrude from the channel, since such a modification would have involved a mere change in the

size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

10. Claims 3, 7 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weber (U.S. Patent No. 5,435,669A) in view of Fox (U.S. Patent No. 5,765,970A).

Weber '669 further discloses the wale being of a unitary construction and said plurality of connecting walls includes a top wall and a bottom wall.

Weber '669 discloses all of the features of the claimed invention with the exception(s) of:

with regard to claims 3, 7 and 30,

an upper reinforcing wall, a lower reinforcing wall, and a plurality of chambers formed between the back wall and the front wall.

Fox '970, as seen in Figure 1, shows a molded plastic retaining wall structure (12) comprising upper and lower reinforcing walls (14) extending between front and back walls to provide internal stiffening (col. 2, lines 30 through 39), the upper and lower reinforcing walls forming a plurality of chambers between the back and front walls.

With regard to claims 3, 7 and 30, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device shown

by Weber '669 such that it would further include upper and lower reinforcing walls thereby forming a plurality of reinforcing chambers as taught by Fox '970. The motivation would have been to provide the wale with internal reinforcements.

11. Claims 4, 5, 31 and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rainey (U.S. Patent No. 6,168,351 B1) in view of Enduro Systems DuroThread Fastener & Hanging Systems.

Rainey '351 disclose all of the features of the claimed invention with the exception(s) of:

with regard to claims 4 and 31,

the wale further comprising a pultruded composite material; and

with regard to claims 5 and 32,

the composite material being fiberglass reinforced plastic resin impregnated composite.

Enduro Systems shows a fastener system comprising a tieback rod and a clamp, the fastener system comprising a fiberglass reinforced plastic resin impregnated composite for applications requiring corrosion resistant and/or non-conductive fasteners.

With regard to claims 4, 5, 31 and 32, it would have been obvious to one having ordinary skill in the art of retaining walls at the time the invention was made to

modify the device shown by Rainey '351 such that the wale would comprise a fiberglass reinforced plastic resin impregnated composite as suggested by Enduro Systems. The motivation would have been to enhance the integrity of the overall wall structure with the use of a corrosion resistant rod.

12. Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rainey (U.S. Patent No. 6,168,351 B1).

Rainey '351 discloses all of the features of the claimed invention with the exception(s):

with regard to claim 29,

the channel having a depth sufficient such that when the wale is secured to the retaining wall, a tieback rod passing through the wale and a fastener do not protrude from the channel.

With regard to claim 29, it would have been obvious to one having ordinary skill in the art at the time the invention was made to make the channel of the device shown by Rainey '351 of a depth sufficient such that when the wale is secured to the retaining wall, a tieback rod passing through the wale and a fastener do not protrude from the channel, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

Conclusion

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tara L. Mayo whose telephone number is 703-305-3019. The examiner can normally be reached on Monday through Friday 8:30 AM to 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas B. Will can be reached on 703-308-3870. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



18 October 2004



ROBERT E. PEZZUTO
PRIMARY EXAMINER